Supreme Court, U.S.
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No. 99-962

IN THE

Supreme Court of the United States

ELMAR LEE PETTIT, NORTH BAY PLUMBING, INC.; and NOR-CAL PLUMBING, INC.

Petitioners,

v.

BAY AREA PIPE TRADES PENSION TRUST FUND; BAY AREA PIPE TRADES HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 HEALTH & WELFARE TRUST FUND; U.A. LOCAL NO. 343 PENSION TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES HEALTH & WELFARE TRUST FUND; NORTHERN CALIFORNIA PIPE TRADES PENSION TRUST FUND; and U.A. LOCAL 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND

Respondents,

On Petition For Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

HENRY F. TELFEIAN
Law Offices of Henry F. Telfeian
1247 Alvarado Road
Berkeley, California 94705-1545
(510) 848-0542

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY, LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037-1302
(202) 293-6400

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I

CONTRARY TO THE RESPONDENTS' POSITION AND THE HOLDING OF THE NINTH CIRCUIT, THIS COURT HAS HELD THAT THERE IS NO FEDERAL SUBJECT – MATTER JURISDICTION OVER A VEIL-PIERCING CLAIM AND NO BODY OF FEDERAL VEIL-PIERCING LAW

The Brief in Opposition ignores the separate identity and interest of the lead petitioner in this case – Elmar Lee Pettit. The first Question Presented in our Petition affects only Mr. Pettit, and its resolution in the respondents' favor by the Ninth Circuit subjected Mr. Pettit to a lengthy federal-court proceeding and resulted in his bankruptcy. We contend that there is no material difference between what the respondents did in this case and what this Court categorically held to be impermissible in *Peacock v. Thomas*, 516 U.S. 349 (1996).

The respondents argue that *Peacock v. Thomas*, *supra*, permits a plaintiff to join an individual over whom there is otherwise no subject-matter jurisdiction to a Section 301 action on a "veil-piercing" theory (Br. in Opp. 6). They acknowledge that *Peacock v. Thomas* would not permit an *independent* proceeding against Mr. Pettit, but they claim that by the simple expedient of joining him as a defendant in their Section 301 action against the corporate employers, the plaintiffs could force Mr. Pettit to participate personally in the extended federal-court proceeding against the corporations and hold him liable under *federal* substantive law – which the Ninth Circuit described as "a substantial body of federal common law regarding veil-piercing." Pet.

App. 12 a. But there was no legitimate Section 301 claim against Mr. Pettit, whose own motion to dismiss should have been granted. This Court should grant certiorari (1) to affirm that the holding of *Peacock v. Thomas* cannot be evaded so easily[1] and (2) to repudiate the Ninth Circuit's creation of "a substantial body of federal common law" on the subject of veil-piercing.[2]

Moreover, permitting a lawsuit against Mr. Pettit violates the teaching of *Textron Lycoming Reciprocating Engine Div. v. United Auto. Aero. and Agric. Implement Workers of America*, 523 U.S. 653 (1998). The claim *against Mr. Pettit* was not based on any breach of a collective-bargaining agreement. The Brief in Opposition (pp. 7-8) cites the complaint's claim for breach-of-contract *against the corporate employers*. But that breach-of-contract claim against other defendants did not affect the federal court's jurisdiction over Mr. Pettit.

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[1] The respondents acknowledge that in *Peacock v. Thomas* Mr. Peacock was joined as a defendant in the original action against the corporate employer (Br. in Opp. 5). Thus the *only* distinction between this case and *Peacock* is that the original complaint in *Peacock* did not make a "veil-piercing" claim but only sought to hold Peacock liable as an ERISA fiduciary.

[2] If "veil-piercing" in cases involving breaches of ERISA plans were a matter of "federal common law," *Peacock* would have been decided differently. The existence of "federal common law" would have supported the *Peacock* plaintiffs' assertion of federal question jurisdiction under 28 U.S.C. § 1331.

II

SECTION 301 SHOULD NOT BE CONSTRUED TO CONFLICT WITH SPECIFIC PROVISIONS OF ERISA

Our petition noted that in *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21 (1983), this Court invoked the limitations specified in ERISA regarding permissible plaintiffs (Pet. 15). We argued that Section 301 should also be interpreted consistently with ERISA's specific limitations.

Respondents turn our argument into a "pre-emption" contention and cite Section 514 of ERISA, which declares that ERISA does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d). Our position is that Section 301 should not be construed to allow trust funds to sue *because* ERISA explicitly gives them no such right. We are not arguing that a contrary Section 301 provision has been superseded by the later enactment of ERISA. We are not, in other words, arguing that ERISA alters, amends, modifies, invalidates, impairs or supersedes Section 301. We maintain that Section 301 – which does not specify *who* may bring a lawsuit – should be construed *in pari materia* with the provisions of ERSIA.

III

ISSUANCE OF UNPUBLISHED AND UNCITABLE OPINIONS PREJUDICES THE RIGHTS OF LITIGANTS

Respondents apparently agree that there is a wide divergence of practices among the courts of appeals regarding the publication and permissible citation of opinions. They contend, however, that this Court should not resolve these conflicts because (1) only the Judicial Conference of the United States should consider the question and (2) litigants are not harmed if a decision is not published or if its citation is forbidden. Neither reason is valid.

(1) The Judicial Conference. -- More than 35 years ago, in 1964, the Judicial Conference made the initial suggestion that has given rise to the current problem and to the great disparity of opinions among Circuit Judges. The Judicial Conference has not acted to reconcile the differing views for the past several decades. There is no reason to believe that discussion within the Judicial Conference among the Circuit Judges will reach a consensus. And while the nation waits to see whether the Judicial Conference will consider this question and how it will decide it – a process that is likely to take many years – litigants continue to be denied the rights they have to fully considered and effective judgments from courts of appeals.

(2) Harm to Litigants. -- Respondents totally mischaracterize the harm caused litigants by the practice of not publishing or forbidding the citation of appellate decisions. We have never claimed that a losing party is deprived of the right to seek further review in this Court if a decision is not published or if its citation is prohibited. The

fact that this Court has recently decided to review two unpublished decisions (see Br. in Opp. 15, n. 46) is not relevant to our contention. Indeed if this Court's determination to review those decisions proves anything, it demonstrates that the authority now granted to judges of courts of appeals to issue opinions that will not be published or may not be cited is equivalent to a license to decide cases in a less-than-fully-responsible manner.

That is precisely the harm that the petitioners have suffered in this case. The panel of the Ninth Circuit that decided petitioners' appeal has been authorized, by Ninth Circuit Rules 36-2 and 36-3, to issue a decision that is, at the court's own option, free of all the restraints of precedent and *stare decisis* that ordinarily limit the process of appellate courts. In this particularly aggravated situation, the court below has chosen to make a portion of its disposition of the case official, publishable and citable, while a large portion is not to be published or cited.

The unpublished "Memorandum" (which covers 24 printed pages (14a – 37a) in the Appendix to our Petition) consists of several rulings that depart from Ninth Circuit precedent and that the court below renders inapplicable for future cases. If the "Memorandum" were binding and citable precedent in the Ninth Circuit, it could not have been issued as it was and could not have arrived at the conclusions it reached. This is the harm that has been caused to petitioners on their appeal. The remedy for that harm *in this case* is to remand the case to the court of appeals for a full rehearing before a different panel of judges who will know that whatever decision they render will be published and will constitute binding precedent in the Ninth Circuit.

CONCLUSION

For the foregoing reasons and those stated in our Petition for a Writ of Certiorari, a writ of certiorari should be granted.

Respectfully submitted,

HENRY F. TELFEIAN
Law Offices of Henry F. Telfeian
1247 Alvarado Road
Berkeley, California 94705-1545
(510) 848-0542

NATHAN LEWIN
(Counsel of Record)
Miller, Cassidy, Larroca
& Lewin, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

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